No. 2793.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

George D. Parker,
Appellant,
vs.
Fred Stebler,
Appollee.

APPELLEE'S BRIEF.

FREDERICK S. LYON,
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APPELLEE'S BRIEF.

The appeal in this case, like that in appeal case No. 2792, involves solely and alone a question of costs. For each of the reasons urged in appellee's brief in case No. 2792 this appeal should be and must be dismissed.

The cases, however, differ in one material respect as to the circumstances under which this suit was commenced. As stated in the Transcript of Record, page 9, after the entry of the interlocutory decree in suit No. 1562 one of the defendants therein, George D. Parker, commenced the manufacture and installation of certain other fruit grading and distributing apparatus and installed several of the same. This suit

was commenced to enjoin the infringement on account of such grading and distributing apparatus (which was not the so-called "modified" Parker machines involved in the accounting in No. 1562, but was an entirely different construction and form of apparatus), and this suit was not brought on reissue patent No. 12,297, the one involved in suit No. 1562, but upon two other patents owned by appellee. After the commencement of this suit and after appellant had filed his answer herein, and while motion for temporary injunction was pending herein, appellant changed and modified the construction of such machines to avoid the charge of infringement of the two patents sued on herein. Such modification made these machines of the construction and type referred to as the "modified" Parker machine held by the master in the accounting in No. 1562 to be an infringement of the reissue letters patent No. 12297.

We thus see that after this suit at bar was commenced to avoid the charge of infringement of these two other patents involved in this case, the appellant modified the machines so that they then infringed the reissue patent No. 12297 and were brought into the accounting in No. 1562. It followed that when the judgment on the accounting had been entered and paid, these modified machines became licensed, under the decision of this court in 214 Fed. 550.

At the time this suit was commenced, and under the issues of the pleadings in this suit, the Strain reissue patent No. 12,297 was in no manner involved, nor would the accounting in that suit have had any effect

upon these machines, nor would any license for these machines have inured to this appellant had he not, *after the motion for injunction in this case was made,* modified the machines to escape the charge of infringement in this case, and thereby brought the machines under the charge of infringement in case No. 1562.

Under these circumstances, and they were all before the District Court and part of its records, and all these facts were brought out upon the accounting in No. 1562 in tracing the history of these machines, the District Court held that the only thing left to adjudicate in this case at bar was who should pay the costs of suit, and adjudged that under the circumstances they should be taxed against the defendant, who is appellant here. Whether such costs should have been taxed against the appellant or appellee was within the discretion of the court, and there is nothing in the record to show that the District Court abused its discretion.

Like in appeal No. 2792, appellant did not take any appeal from the taxation of costs by the clerk of the court, and it is also insisted that there can be no review of the question of costs in this court for that reason. The transcript does not show that any solicitor's docket fee was taxed. If there was any solicitor's docket fee taxed there was no appeal from the action of the clerk in taxing such docket fee, and any such action of the clerk in taxing the solicitor's docket fee would not be open to review in this court under the decision of this court in Tyler Mining Co. v. Sweeny, 79 Fed. 277, 282.

Undoubtedly items of expense were taxed against appellant in this case by virtue of the motion for temporary injunction, which appellant avoided by entirely changing the character of the infringing machines. In this connection it is to be noted that had appellant not modified these machines after this suit was brought, the accounting in No. 1562 would have had no bearing whatever upon this suit, as there was no charge in this suit of any infringement of reissue patent No. 12,297. This is clear from the fact that this suit was brought after the injunction had been affirmed in No. 1562 by this court (214 F. 550), and appellee was not in contempt for bringing this suit.

The appeal should be dismissed and the judgment affirmed with costs of this court in favor of the appellee.

FREDERICK S. LYON,
Solicitor for Appellee.